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SUPREME COURT, U.S.

IN THE

UNITED STATES SUPREME COURT

80-6451

WRIT OF CERTIORARI

WILLIE JAMES GIBSON, PETITIONER.

VERSUS

FRANK C. BLACKBURN, WARDEN, RESPONDENT.

DRAFTED BY:

WILLIE JAMES GIBSON

#80839 SPRUCE 2

LOUISIANA STATE PENITENTIARY

ANGOLA, LOUISIANA 70712

WILLIE JAMES GIBSON

versus

FRANK C. BLACKBURN

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IN THE

UNITED STATES SUPREME COURT

WILLIE JAMES GIDEON, PETITIONER

VERSUS No._____

FRANK C. BLACKBURN, WARDEN, RESPONDENT.

PETITION OF CERTIORARI FOR REVIEW OF

THE INFERIOR COURTS DECISIONS:

JURISDICTION:

On Jan. 30, 1981, order was issued denying Petitioner's motion for a Certificate of Probable Cause and a motion for Leave to Appeal in Forma Pauperis were denied and now Petitioner's claims are presented for review. The petition for certiorari is filed within ninety (90) days of the date the United States Court of Appeals denied Petitioner's motions. This Court's jurisdiction is invoked under 28 U.S.C., Section 1254 (1) and Rule 22 (2) of the rules of the Supreme Court of the United States.

CONSTITUTIONAL ISSUES AND QUESTIONS:

1.) Did the State prove it's case beyond a reasonable doubt that a rational trier of factor could have found Petitioner guilty and was every element of the crime proven using the "reasonable doubt standard?'

2.) Did the circumstances of the Unconstitutional pretrial line-up create taintness and suggestion and thereby prejudicing the mind of the victim against Petitioner, and if suggestion employed, was it harmless error?

3.) Did Petitioner's trial counsel allow the minds of the jury to be prejudiced against him counsel 1.) Did not object to the evidence tendered against Petitioner, and 2.) Counsel did not question the victim-witness thoroughly to find out what,if anything, was there about Petitioner's mouth that made her positive Petitioner was the man that robbed her? And further, did counsel render reasonably effective assistance when counsel 1.) Filed no pretrial motion to suppress the identification testimony, which was the strenght of the States case against Petitioner, 2.) Counsel did not file a pretrial motin to suppress the evidence or a motion to quash, 3.) Counsel did not secure all of Petitioner's alibi witnesses, 4.) Counsel did not bring it to the jury's attention that Petitioner's witnesses could only have seen and talked with Petitioner on either Jan. 15 or Jan. 16 1975 because prior to that time Petitioner was a prisoner at the Monroe City Jail for approximately two (2) months, and 5.) Counsel failed to present two (2) other alibi witnesses for the Honorable Judge to weigh their testimony at a motion for a new trial, and if counsel's neglect did create prejudice thereby, was it harmless?

STATUTORY PROVISIONS CITED:

U.S.C. Art. IV Sect. 1. provides that;

All born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and in the State wherein they reside. No State shall make

or enforce any law which shall abridge the privileges or immities of citizens of the United States; Nor shall any State deprive any person of life, liberty, or property without due process of law. Nor deny to any person in it's jurisdiction equal protection of the law.

As far back as the Anglo American era, it was said "it was better to let the guilty go free than to convict the innocent.

STATEMENT OF THE CASE:

On Jan. 16, 1975, Petitioner, Willie James Gibson, was arrested for escape from the Monroe City Jail. An armed robbery occurred on Jan. 15, 1975 and on Feb. 6, 1975 the District Attorney's office filed a bill of information charging Petitioner. Petitioner was arraigned and appointed counsel on or around Feb. 6, 1975 and on March 6, 1975 Petitioner was tried, by jury, and convicted of armed robbery. Consequently, on April 24, 1975 Petitioner was sentenced to a term of fifteen years, at hard labor, to the custody of the Department of Corrections, Angola, Louisiana 70712. Appeal was taken to the Louisiana Supreme Court and on Jan. 2, 1976 the appeal was denied. see State v. Gibson, La. 323 So. 446.

Application for habeas action was filed into the trial court on or around July 3, 1978 and on August 18, 1978 a hearing was granted and the writ was denied. Petitioner's newly appointed counsel filed an appeal from the denial of the writ and on Dec. 15, 1978 the appeal was denied.

WILLIE JAMES GIBSON

versus

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On Dec. 14, 1979 Petitioner went on to file an application for habeas action into the United States District Court, for the Western District, alledging his same three (3) claims. On Nov. 10, 1980 Petitioner's habeas action was denied. Consequently, Petitioner filed a notice of appeal, forma pauperis, and a motion for an issuance of a certificate of probable cause into the U.S. District Court and on Dec. 11, 1980 Petitioner was denied. Following, Petitioner filed same in the United States Court of Appeals, for the Fifth Circuit and on Jan. 30, 1981 Petitioner's motions were again denied.

STATEMENT OF THE FACTS:

On Jan. 15, 1975 the Monroe City Police Department receive a complaint of an armed robbery at the Seven-Eleven Food Store at South Second and Winnsboro Road, Monroe, Louisiana. The attendant, Mrs. Griffin, informed the police that a black male wearing maroon pants, white knit shirt, and black and white tennis shoes came into the store at approximately 10:20 p.m. and robbed her of sixty-four ($64.00) dollars. The victim stated that she was filling out her daily report when a man came in and went to the magazine rack and stayed there for a while. And that two (2) other customers came in behind him. One of them went to the magazine rack also and the other made a purchase. The other two (2) left and the first man stayed. The victim stated that the man then went to the cooler and started to look over the sanwiches, and that she went to the cooler to get a drink and the man was bending over looking on the bottom sheves, so she went back to the counter and continued to fill out her report. The victim stated that she thought the man had left because she thought she heard the door open. She stated that she

felt someone behind her and when she turned the man was right in her face. The victim stated that the man hit her with a slapper (16 in. layer of stitched lather) that she was hit across the left eye and nose and she fell to the floor. The victim stated that the man could not open the cashregister and he made her get up and open it.

Mrs. Griffin was hopitalized for broken nose and injury to her left eye and as soon as her eye healed sufficiently she was shown some photographs and she picked Petitioner as the man that robbed her.

THE FACTS OF THIS CASE CAN BEST BE EXPLAINED AS FOLLOWS:

On Jan. 16, 1975 Petitioner, prior to being incarcerated for two (2) months, was apprehended for escape and questioned about the armed robbery of a Seven Eleven Food Store. After being taken back to the Monroe City Jail police took a color photo of Pettioner. And days later Petitioner was told that the victim of the armed robbery had picked his picture as being the robber. Petitioner was advised that he was under arrest for armed robbery and Petitioner requested that an attorney be appointed him since Petitioner was unable to afford one. However, Petitioner's request was disregaurded. Petitioner was taken to the Ouachita Parish Jail where a lineup was held and again the victim picked Petitioner as the man that robbed her.

Subsequently, Petitioner was prosecuted and convicted. Petitioner has exhausted his remedies and now comes to this Honorable Court seeking relief.

WILLIE JAMES GIBSON

versus

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LEGAL PRINCIPLES:

Under our system of laws in these United States, even a thief is entitled to complain of an unconstitutional conviction if he is imprisoned as an armed robber.

No longer is a mere modicum of evidence on each element of the crime/statutory offence sufficient to convict. The some evidence rule as enunciated in Thompson v. Louisville, 362 U.S. 1960, has matured and evolved into the quantum and quallity reasonable doubt standard of In Re Winship, 397 U.S. 358 (197) and Jackson v. Virginia, 99 S. Ct. 2781 (1979).

A.

THE STATE'S EVIDENCE:

S-1 - Search warrant waiver, S-2-1 maroon pants, S-2-2 white knit shirt, S-3-1 to S-3-6 photographs, S-4-Linrup report, and the Testimony of the Victim-Witness.

AUTHORITY ON CLAIM 1.

Claim 1. - The Verdict contrary to the law and the evidence;

Petitioner submits that the evidence that the State produced and used was not sufficient to sustain a conviction beyond a reasonble doubt.

In the Federal courts and in most States, the judge, if he believes that the prosecution failed to make out a case, or that the law is in favor of the defendant, can take the case away from the jury by directing them to return a verdict of not guilty. However, the court has no power to direct a verdict of guilty, even when the incriminating evidence is conclusive and uncontradicted. The reason for this rule is that the court can not set aside a verdict of acquittal. See Underhill, Criminal

Evidence 433 (4th ed. 1935). The grounds for a motion for a new trial, although varied, are based upon errors that do not appear on the face of the records, it will be remembered, includes the recital of the legal steps that have been taken, such as the filing of the indictment, the arraignment and pleas, the holding of trial such as the selection of the jury. The admitted or excluded evidence, the questions that were or were not permitted to be asked, and the instructions to the jury that were given or refused. The Federal Rules of Criminal Procedure, rather than list the causes for a new trial provides that "The court may grant a new trial to defendant if required in the interest of Justice'. Rule 33. The power to grant a new trial, to a lesser degree than the power to direct a verdict of the jury. See Slovenko, Control over the jury verdict in Louisiana Criminal Law, 20 La. L. Rev. 657 (1960). The function of a trial judge in a motion for a new trial as in directing a verdict, is very important because he can in effect substitute his judgment for that of the jury on the question of innocent or guilt. Article 773 of the 1966 code, following the law of most States, provides for a directed verdict in jury trials, as well as allowing the court to enter a judgment of acquittal in judge tried cases, when after the close of the State's evidence or of all the evidence, the evidence is not sufficient to sustain a conviction. According to the majority of jurisdictions the trial judge the trial judge should not set aside a verdict of guilty as being "contrary to the law and evidence" when "some' evidence is presented upon which the jury could have reasonably based their conclusions.

Since the granting or refusing a motion for a new trial for insufficiency of evidence is a matter entirely within the discretion of the trial judge,; In the case of State v. Ricks,

WILLIE JAMES GIBSON

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FRANK G. BLACKBURN

170 La. 507, 128 So. 293 (1930), the trial judge denied a motion for a new trial and the defendant on appeal argued to the court that the verdict was contrary to the evidence. The Supreme Court held that it can only pass on question of law and not on the guilt or innocence of the accused, and therefore could not review the trial judge's ruling on the motion for a new trial. Any other ruling would be contrary to the provisions which gives the Supreme Court appealate jurisdiction on questions of law alone. However, as the law requires that a conviction be based upon evidence beyond a reasonable doubt of the defendant's guilt, the question of whether there is sufficient evidence is a question of law. The court has ruled that the refusal of a trial judge to grant a motion for a new trial is appealable in cases where there is no evidence to support the conviction. If a trial judge overrules a motion for a new trial when no evidence at all is adduced to prove a necessary element of the crime, a question of law is presented which is appealable. As Chief Justice Oniell remarked in State v. Martinez, 201 La. 949, 953, 10 So. 2d 712, 713 (1942)...

> The line is drawn between an insufficiency of evidence and a total lack of evidence of fact or facts required to prove the guilt of the party accused.

In Re Winship, 397 U.S. 358 (1970), presupposes as an essential of the due process guaranteed by the 14th Amendment "that no person shall be made to suffer onus of a criminal conviction except upon sufficient proof defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every elemet of the offense.

In Jackson v. Virginia, 99 S. Ct. 2781 (1979), the court

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versus

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hol's that a State conviction must be affirmed if any evidence in the record supports the conviction. But rather must reach it's decision on the basis of whether the evidence was sufficient to justify a rational trier of factin finding guilt beyond a reasonable doubt.

In 1963, the Supreme Court again commented on the subject of denial of the due process by reason of lack of evidence in Garner v. Louisiana, 363 U.S. 157, 82 S. Ct. 248, 7 L. Ed. 2d 207. Mr. Chief Justice Warren Speaking for the court stated:

> "In view we take of the cases we find it unnecessary to reach the broarder constitutional questions presented, and in accordance with our practice not to formulate a rule of Constitutional law broarder that is required by the precise facts presented in record for the devoid of evidentiary support as to render them under the due rocess clause of the 14th Amend., as in Thompson v. Louisiana, 362 U.S. 199, 80 S. Ct. 624, 4 L. Ed. 2d, our inquiry does not turn on a question of evidence to support a conviction, but on whether these convictions rest upon evidence which would support a finding that the Petitioner's acts caused a distubance of the peace. Id. at 251.

B.

ARGUMENT ON CLAIM II.

CLAIM VI. SUGGESTIVE IDENTIFICATION:

The State made Petitioner's pretrial photographic lineup tainted and suggestive in taking the victim photographs while

WILLIE JAMES PERSON

versus

FRANK C. BLACKBURN

Petitioner was already in police custody, further, the State took two (2) pictures of Petitioner to the victim and violated Petitioner's fundamental rights of the 14th Amend. under the due process clause.

AUTHORITIES:

IDENTIFICATION BY PHOTO BEFORE THE LINEUP IS SUGGESTIVE:

PEOPLE V. MacPHERSON, 2 Cal. 3d 109, 465 P. 2d 17, 84 Cal. Rptr. 129 (1970).

Imparting to the witness the belief of the police that "we have our man" can be impermissibly suggestive, for the witness is then likely to select the participant who looks "most like" the man. PEOPLE V. LOGAN,25 N.Y. 2d 184, 189, 250 N.E. 2d 454, 456, 303 N.Y.S. 2d 353, 356 (1969). In NEIL V. BIGGERS, 409 U.S. 188 (1972), the court further suggest that the primary due process question in identification settings concerns an identification is reliable and concluded that an impermissibly suggestive pretrial confrontation should not be excluded "a very substantial likelihood of irreparable misidentification."

In STOVALL V. DENNO, 388 U.S. 293 (1967) the court formed the due process test as follows:

> The confrontation... was so unnecessarily suggestive conducive to irreparable mistaken identification that defendant was denied due process of law... However, a claimed violation of due process of law in the conduct of a confrontation depend on the totality of the circumstances surrounding it. at 301-302.

ONCE A SUSPECT IS IN POLICE CUSTODY THERE IS NEVER ANY

United States Court of Appeals

FIFTH CIRCUIT

GILBERT F. GANUCHEAU
CLERK

OFFICE OF THE CLERK
TEL 504-589-6514
600 CAMP STREET
NEW ORLEANS LA 70130

January 30, 1981

CASE RELATED INQUIRIES

COMM.	FTS
589-	682-
AL & GA	6192
FL	6131
LA & MS	6104
TX	3892

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 80-8368 - GIBSON vs. BLACKBURN
(D. C. No. CA 791714-M)

The following action has this day been taken in the above case:

( ) AN EXTENSION OF TIME has been granted to and including 80-6451

( ) for filing appellant's/petitioner's brief.

( ) for filing appellee's/respondent's brief.

( ) for filing reply brief.

( ) for filing petition for rehearing -

( )

( ) Motion to consolidate granted.

( ) Motion to supplement or correct the record granted.

( ) Motion for leave to file supplemental brief granted.

( ) Motion for leave to file brief amicus curiae is granted.

( ) Joint motion as to time for filing briefs granted.

(X) Order enclosed has been entered.

( )

GILBERT F. GANUCHEAU Clerk

By Betty G. Martinez
Deputy Clerk

cc: Mr. Willie James Gibson
Mr. Walter Lee Perkins, Jr.
Mr. Robert H. Shemwell, Clerk

P. S. to Mr. Shemwell: Returned herewith are the record on appeal and four envelopes of state court papers. Please acknowledge receipt on the enclosed copy of this letter.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNIT A

U.S. COURT OF APPEALS
FILED
JAN 30 1981
GILBERT F. GANUCHEAU
CLERK

No. 80-8368

WILLIAM JAMES GIBSON,

Petitioner,

versus

FRANK C. BLACKBURN, Warden,

Respondent.

- - - - - - -

On Application for Certificate of Probable Cause and for Leave to Appeal in Forma Pauperis

- - - - - - -

O R D E R:

IT IS ORDERED that petitioner's pro se application for certificate of probable cause and for leave to appeal in forma pauperis is DENIED

UNITED STATES CIRCUIT JUDGE

U. S. DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
FILED
DEC 11 1980
ROBERT H. SHEMWELL, CLERK
BY _____ DEPUTY

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

WILLIAM JAMES GIBSON,
Petitioner

VS. CIVIL ACTION NO. 791714

FRANK C. BLACKBURN, WARDEN,
LOUISIANA STATE PENITENTIARY

MEMORANDUM RULING ON MOTION FOR
ISSUANCE OF CERTIFICATE OF PROBABLE CAUSE

For reasons enumerated in a seven-page opinion dated November 10, 1980, this Court dismissed petitioner's application for a writ of habeas corpus. Petitioner, reiterating the same three reasons urged in his application for habeas corpus, requests that this court grant a certificate of probable cause.

Rule 22(b) of the Federal Rules of Appellate Procedure, outlines the responsibility of the district judge upon the filing of such an application. If, as here, an appeal has been taken, the district judge should either issue a certificate of probable cause or state the reasons why such a certificate should not issue. The tests for granting a certificate of probable cause indicate that the standard requires something more than the absence of frivolity, and that the standard is a higher one than the "good faith" requirement. See discussions at 43 F.R.D. 343 and 50 F.R.D. 153.

The reasons asserted in our memorandum ruling denying the petition for habeas corpus are reiterated and assigned as our reasons for denying a certificate of probable cause. There is absolutely no merit to petitioner's contention that the verdict was contrary to the law and the evidence. The testimony of the victim of the armed robbery is explicit and unambiguous.

COPY SENT
DATE 12-11-80
BY _____
TO: Gibson
Perkins

There is no merit to petitioner's contention in regard to the out-of-court identification. This allegation is completely refuted by the record which contains the testimony of the police officers and the victim, to the effect that after the robbery the victim gave a good description of petitioner which enabled the officers to arrest him, and subsequently the victim was presented with six color photographs from which she immediately picked out the photograph of petitioner.

There remains the contention that Mr. Gibson was denied effective assistance of counsel. The state judge held a full and fair evidentiary hearing on this contention and concluded that petitioner's court appointed counsel did everything that was required of him to meet the standard of effectiveness for retained and/or appointed counsel. No useful purpose is to be served by a repetition of the details which are set forth in this court's memorandum ruling of November 10, 1980.

The motion for a certificate of probable cause is denied.

THUS DONE AND SIGNED in Chambers at Lake Charles, Louisiana, on this the 11th day of December, 1980.

EDWIN F. HUNTER, JR.
UNITED STATES SENIOR DISTRICT JUDGE

WILLIE [illegible] GIBSON

VERSUS

FRANK C. BLACKBURN

People Vs Mattson, 51 Cal. 2d 777, [illegible], 336 P. 2d 937; People Vs Avilez, 56 Cal. App. 2d 289, 296, 134 P. 2d 849; Mitchell Vs United States, 104 U.S. App. D.C. 57, 259 F. 2d 787,788.

5.

Each of the above stated claims, individually and collectively, had deprived Petitioner of his Federally protected rights under the United States Constitution and has so severely prejudiced his cause before the trier of fact that the conviction by which Petitioner's liberty is abridged is a gross miscarriage of Justice.

6.

WHEREFORE, the premises considered, Petitioner asks the court for issuance of a certificate of probable cause to prosecute an appeal

Respectfully Submitted

Willie James Gibson
#80839 Spruce 2
Louisiana State Penitentiary
Angola, Louisiana 70712

U. S. DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
FILED
DEC 11 1980
ROBERT H. SHEMWELL, CLERK
BY [illegible] DEPUTY

O R D E R

It is hereby ordered that a certificate of probable cause be ~~denied~~ issued and is ~~denied~~ issued this 11th dayof December 19 80

[illegible]
Honorable Judge

(3)

See Reasons Assigned on Order.

COPY SENT
DATE 12-11-80
BY [illegible]
TO: Gibson

IN THE

SUPREME COURT OF THE UNITED STATES

****

NO. 80-6451

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****

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WILLIAM JAMES GIBSON,
Defendant-Petitioner

VERSUS

STATE OF LOUISIANA,
Plaintiff-Respondent

****

RESPONSE IN OPPOSITION TO A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

****

WILLIAM J. GUSTE, JR.
ATTORNEY GENERAL
STATE OF LOUISIANA

BARBARA R. RUTLEDGE
ASSISTANT ATTORNEY GENERAL
STATE OF LOUISIANA

JOHNNY C. PARKERSON
DISTRICT ATTORNEY
FOURTH JUDICIAL DISTRICT
MONROE, OUACHITA PARISH, LOUISIANA

JOHN R. HARRISON
ASSISTANT DISTRICT ATTORNEY
POST OFFICE BOX 1652
MONROE, LOUISIANA 71201

TABLE OF AUTHORITIES

Jackson v. Virginia, U.S. Va 99 S.Ct 2781, 443 U.S. 307, 61 L.Ed 2d 560 (1979) re den 100 S.Ct 195	2
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United States v. Gutierrez, 560 F.2d 195 (5th Cir. 1977)	3
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United States v. Aulet, 618 F.2d 182 (2nd Cir. 1980)	4
United States v. Campbell, 616 F.2d 1151 (9th Cir. 1980)	4
United States v. Nelson, 582 F.2d 1246 (10th Cir. 1978)	4

STATEMENT OF FACTS

MAY IT PLEASE THE COURT:

On January 15, 1975, Officers of the Monroe Police Department received a call to check on a reported armed robbery at the 7-11 on South Second and Winnsboro Road, Monroe, Louisiana. The Officers arrived at the store and discovered Mrs. Patsy F. Griffin being attended to by customers for injuries she had received in the armed robbery which Officers had been called upon to investigate. Mrs. Griffin told these Officers that an individual had entered the store and after customers had left, approached her from behind. As Mrs. Griffin turned to face this individual she was hit in the face with a "slapper" and knocked down. After the victim was knocked down she was told to get up and open the cash register which she did. She was then told to lay down on the floor and did so. The suspect took $64.36 and left the store. The suspect was described by the victim as being a dark skinned black male of small frame, and about 5 feet 8 inches to 5 feet to 9 inches tall who was wearing a white shirt with maroon pants. The shirt was further described as a knit pullover having a red ring around the collar and a red ring around each sleeve. The suspect was also described as having on black tennis shoes with white soles. The weapon was described by the victim as being a leather object which was round on the end and flat on the sides. It was carried in the suspect's pocket prior to the robbery.

On January 21, 1975, Detectives from the Monroe Police Department went to the residence of Mrs. Griffin to show her six (6) polaroid color potographs. The fifth photograph was that of petitioner Willie James Gibson. Upon viewing these photographs Mrs. Griffin picked out the photograph of Willie James Gibson as being the person who had struck her and removed the money from the cash register.

On January 27, 1975 Willie James Gibson was removed from the Monroe City Jail and taken to the Ouachita Parish Jail to be viewed in a line-up by the victim, Mrs. Griffin. He was placed in the line-up with five (5) other individuals of similar appearance. He was in the number two (2) position in the line-up. Mrs. Griffin picked out Willie James Gibson as being the person who had hit her and subsequently taken the money from the store.

A Bill of Information was filed on February 3, 1975, charging Willie James Gibson with armed robbery. Willie James Gibson was tried on March 6, 1975 and found guilty as charged. On April 24, 1975, Willie James Gibson was sentenced to serve fifteen (15) years at hard labor and given credit for time served.

From this conviction Willie James Gibson has filed this Petition for a Writ of Certiorari.

1

Petitioner first asserts that there was insufficient proof of his guilt beyond a reasonable doubt. This Honorable Court has allowed review by Habeas Corpus proceedings of a state prisoner's claim that his conviction was based on evidence which was not adequate to prove guilt beyond a reasonable doubt. Jackson v. Virginia, U.S. Va. 99 S. Ct 2781 443 U.S. 307, 61 L. Ed 2d 560 (1979) reh den 100 S. Ct 195. However, that decision requires relief only if "....it is found that upon the record evidence adduced at the trial no rational Trier of fact could have found proof of guilt beyond a reasonable doubt." Jackson v. Virginia, Supra @ 99 S. Ct. 2792. Further, record of the evidence must be reviewed "....in the light most favorable to the prosecution." Jackson v. Virginia, Supra @ 99 S. Ct. 2792.

Armed robbery in Louisiana is defined under Section 14:74 of the Louisiana Revised Statutes as "....the theft of anything of value from the person of another, by use of force or intimidation, while armed with a dangerous weapon."

The victim identified Willie James Gibson by photographic line-up, by a corporeal line-up, and in court as the individual who had struck her with a "slapper" and who had taken $64.36 from the store.

A review of the trial transcript shows that a rational trier of fact could find the petitioner guilty beyond a reasonalbe doubt based on the evidence presented.

2

Petitioner's second objection concerns introduction of evidence of a photographic line-up at trial. No objection was made to the intorduction of the photographic line-up (page 111, trial transcript) nor was any objection offered as to State's testimony with regard to the identification of the defendant. Article 841 of the Louisiana Code of Criminal Procedure provides in part: "an irregulatiry or error cannot be availed of after verdict unless it was objected to at the time of occurence....." The Louisiana Supreme Court has upheld this statute saying "where there is no contemporaneous objection, the defendant cannot complain of an alleged error or irregularity in the proceedings after the verdict has been rendered". State v. Williams, Sup. 1977, 343 So 2d 1026, Cert. denied 98 S Ct. 412, 434 U.S. 928 54 L Ed 287. This rule has been applied to Louisiana to a victim's in-court identification where no objection was made at trial to any of victims identification. See State v. LeCompte, Sup. 1978, 371 So. 2d 339. Article 841 of the Louisiana Code of Criminal Procedure conforms generally with Rule 51, Federal Rules of Criminal Procedure. Issues which are not objected to

during trial which do not constitute clear error are waived and cannot be raised on appeal. See, State v. Maddox 492 F 2d 104 (5th Cir. 1974), United States v. Gutierrez 560 F2 195 (5th Cir. 1977).

United Stated v. Ceuto, 611 F 2d 1056 @ 1063-1064 (5th Cir. 1980) stated, "The due process standard for reviewing photographic identification procedures constitute a two-part test. The court must first decide whether the photographic display was impermissibly suggestive. If the court concludes that the display was suggestive, it must then determine whether the procedure creates a substantial likelihood of misidentification. Reliability is the linchpin in determining the admissibility of identification testimony". (citations omitted). In the instant case, unlike Cueto, Supra, officers presented the victim with an array of six (6) similar photographs depicting different individuals.

Although a defendant has been arrested, a photographic line-up may be used if it is otherwise reliable. United States v. Higginbotham, 539 F 2d 17 (9th Cir. 1976).

3

Petitioner now asserts that his trial counsel was incompetent. "Claims of ineffective assistant of counsel require an inquiry into the actual performance of counsel and the determination whether representation was reasonably affective must be based on the totality of the circumstances". Beckham v. Wainwright, 639 F 2d 262 (5th Cir. 1981). Petitioner suggests that one of the basis which tends to show that his court appointed counsel was incompetent is that he filed no pretrial motions. A hearing on an Application for a Writ of Habeas Corpus was heard in the Fourth Judicial District Court, Parish of Ouachita, State of Louisiana, on August 18, 1978 and evidence was adduced on this point. Counsel for the defendant testified that he filed no motions "based on the examination of the case" (transcript of testimony at hearing of Application for a Writ of Habeas Corpus, Page 3 Line 4). Petitioner is under the mistaken belief that counsel is required to file pretrial motions in every case. That is not so, "....counsel must use 'professional discretion in deciding whether there was sufficient grounds' for such a motion". U.S. v. Aulet 618 F2 182 (2nd Cir. 1980) Petitioner also notes that his attorney did not locate all of his witnesses. His attorney testified that he was only given the names of possible witnesses and he made substantial effort to locate these persons (Transcript of testimony at hearing of Application for a Writ of Haveas Corpus Page 4, Line 20). A review of testimony of witnesses at trial shows that these witnesses did little to support defendants testimony. The testimony of missing witnesses would only be cumulative to the witnesses that testified. Petition further states that objections were not made to certain items of evidence in-

troduced at trial by the State. His counsel stated that he did not do so because he felt that the evidence was favorable to the defendant . (Transcript of testimony at hearing of Application for a Writ of Habeas Corpus, Page 6 Line 16). Petitioner also objects that his counsel "did not strategically question" the victim. Petitioner is not entitled to a perfect attorney. One court has held in the regard, "the sixth amendment guarantees....'reasonably competent and effective representation of counsel'. (Petitioner) is not, however, entitled to an attorney who will make no mistakes". U.S. v. Campbell 616 F2 11511, (9th Cir. 1980). Another Federal Court discussing adequacy of legal counsel has siad, "one who claims such a deprivation (of right to adequate counsel) faces a heavy burden. Adequacy of legal representation is measured neither by hindsight nor success. The standard of adequacy of counsel....is that a defendant will be considered to have had adequate counsel unless counsel's representation at trial was of such a substandard level as to render the trial a mockery of justice and a sham...." U.S. v. Nelson 582 F2 1246 @ 1250 (10th Cir. 1978). A review of the trial transcript and the transcript of hearing by the trial court of the Application for a Writ of Habeas Corpus show that petitioner was adequately represented.

CONCLUSION

It is respectfully submitted that the petitioner's present Application for a Writ of Habeas Corpus is without merit and should be denied.

Respectfully submitted,

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STATE OF LOUISIANA

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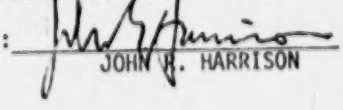
BY: 
JOHN R. HARRISON

IN THE

SUPREME COURT OF THE UNITED STATES

ORIGINAL

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No. 80 - 6451

WILLIE JAMES GIBSON,
PETITIONER

'VERSUS'

STATE OF LOUISIANA, ex rel.

Frank C. Blackburn, warden, respondent

REPLY BRIEF IN RESPONSE TO
BRIEF IN OPPOSITION

DRAFTED BY:

WILLIE JA MES GIBSON

#80839 ASH-4

ANGOLA, LOUISIANA 70712

"TABLE OF AUTHORITY"

PEOPLE V. GOULD, 54 Cal. 2d 631, 481 P. 2d 212, 93 Cal. Rptr 204 (1971)..... 1

UNITED STATES V. FITZPATRICK, 437 F. 2d 19 (2d Cir. 1970)..... 2

UNITED STATES V. WILLIAMS, 436 F.2d 1166 (9th Cir. 1970)..... 2

PEOPLE V. LAWRENCE, 4 Cal. 3d 273, 280, 481 P. 2d 212, 217 93 Cal. Rtpr 204, 209 (1971)..... 2

UNITED STATES V. ZEILER, 427 F. 2d 1305..... 2

THOMAS V. WYRICK, 535 F. 2d 407 (1976) 8 Cir. 3-4

Mitchell V. United States, 104 U.S. App. D.C. 57, 259 F. 2d 787, 793..... 4

Willie James Gibson, ...No. 80-6451
Petitioner

Versus

Frank C. Blackburn, Warden, ...Filed:_____
Respondent.

REPLY BRIEF:

Comes the Petitioner, Willie James Gibson, and for his reply brief to respondents opposition; states:

1.

In review ing the transcript, this Honorable Court will find that there was not suffient evidence for a trier of fact to find Petitioner guilty "Beyond A Reasonable Doubt", because, A) The identification procedures were illegal and violated Petitioner's Constitutional Safeguards under the "due process" clause of the Fourteenth Amendment; i.e. "Once a suspect is in police custody there is never any justification for employing photo identification procedures since a corporeal lineup is available" People V. Gould, 54 Cal. 2d 631, 481 P. 2d 212, 93 Cal. Rptr 204 (1971). B) Petitioner further argues that a rational trier of fact would not have found him guilty "Beyond A Reasonable Doubt," because of the physical as well as the tesimonial evidence adduced in the original trial of this matter. i.e. S-2-1, S-2-2, and the testimony of the victim-witness, positive of the robber by("His Mouth") Tr. 85); Further, the victim-witness testified that the only time that she saw the robbers' face was ("Right before he hit me, when I turned, that's when I saw his face.") Tr. 76). C.) With the testimony of Petitioners' alibi witnesses, Petitioner strenuously avers that a rational trier of fact should not have found him guilty.

2.

Petitioner does not deny that there were no objections made concerning introdution of evidence of a photographic lineup at trial, nor

does Petitioner deny, there were no objections to the State's testimony reguarding the identification of Petitioner. However, Petitioner avers that Article 841 of the Code (in part) i.e. "An irregularity or error cannot be availed of after verdict unless it was objected to at the time of occurence.", "does not apply" since Petitioner did not have the effectiveness of counsel as guaranteed through his Constitutional Safeguards. Further, as in United States V. Fitzpatrick, 437 F. 2d 19 (2d Cir. 1970) and United States V. Williams, 436 F.2d 1166 (9th Cir. 1970)..... "Nevertheless, in applying a due process test to photo identification procedures while the suspect is in police custody courts have criticized but condoned the procedures. However, when photo procedures are employed with the conscious purpose of avioding a corporeal lineup with "full" Constitutional protection courts are likely are likely to find the procedures "Unfair." People V. Lawrence, 4 Cal. 3d 273, 280, 481 P. 2d 212, 217, 93 Cal. Rptr 204, 209 (1971) (Sullivan, J. Dissenting).

The Third Circuit, on reconsideration of the problem held in Zeiler, 427 F. 2d 1305, "that once a defendant is taken into custody he is entitled to have counsel present at any subsequent photographic lineup. While we think the rule is subject to exceptions, we agree with Zeiler's analysis that the dangers of mistaken identification from uncounseled lineup identifications set forth in Wade are applicable in large measure to photographic as well as corporeal identifications. These include, notably, the possibilities of suggestive influence or mistake- particularly where witness had little or no opportunity for detailed observation during the crime; the difficulty of reconstructing suggestivity even greater when the defendant is not even present; the tendency of a witness identification, once given under these circumstances, to be frozen. While these difficulties may be somewhat mitigated by preserving the photographs shown, it may also be said that a photograph can preserve the record of a lineup. Yet this does not justify a lineup without counsel. The same may be

said of the opportunity to examine the participants to what went on in the course of the identification, whether at lineup or on photograph. Sometimes this may suffice to bring out all the pertient facts, even at a lineup, but this would not suffice under Wade to off set the Constitutional infringement brought by proceeding without counsel. The presence of counsel aviods possibilities of suggestiveness in the manner of presentation that are otherwise ineradicable. "If the witness photographic confrontation was lawful, as the Government now contends, it would not only have independant standing as evidence, byt indeed as this court has already pointed out en- banc, the testimony of a witness pre-trial identification is likely to have far more weight with the jury than taken for granted in court identification."

Furthermore, Petitioner denies the contention of the State that the victim was taken six (6) photographs for viewing, because, in the victim's testimony she states: (Tr. 92) "There were two.", photographs of Petitioner, along with others, shown to her.

Therefore, because of the contradicting testimonies of the victim to the alibi witnesses, i.e. the unreliablity of the victim's testimony, a rational trier of fact should not have found Petitioner guilty "Beyond a Reasonable Doubt."

(3)

Petitioner does not deny that he was given a hearing on the claim of "effective Assistance of Counsel", however, Petitioner does continue his assertion that his counsel was in fact "ineffective". At the hearing on this claim, counsel admitted that he did not file any pretrial motions, nor object to the evidence tendered by the State. Contrary to the State's contention that Petitioner is under the mistaken belief that counsel is required to file pretrial motions in every case, Petitioner is under the belief that counsel should investigate and/or research every avenue of possible defense. Thomas V. Wyrick, 535 F. 2d 407 (1976) 8 Cir. at 414: States:

"Clearly, a defendant must bear the initial burden of demonstrating that counsel failed to perform some essential duty. However, once this failure has been established, it is not so clear which party bears the burden of establishing that counsel's error so significantly under-cut the reliability of the trial process as to require reversal. Secondly, we emphasize that where the attorney's breach of duty has been serious, it is not necessary that the Petitioner demonstrate by perponderance of the evidence that adequate representation would have produced an acquittal. The Petitioner need only to shoulder the additional burden of showing that the alleged error itself sufficiently under-cut the reliability of the trial process to have prejudiced the Petitioner's right to a fair trial. At 415; The Court further quoted from Mc Qeen. "The Petitioner must shoulder an initial burden of showing the existence of admissible evidence which could have been uncovered with reasonable investigation and which would have proved helpful to the original trial. 498 F.2d at 220. At 416; "But once it is shown that defense counsel breached an essential duty, the sufficieny of Petitioner's proof of prejudice turns on whether admissible evidence has been uncovered which a jury could reasonably weigh in assessing guilt or innocence.

Petitioner further contends that counsel's "divergent interest" (defending Petitioner - Running for public office) curtailed his efforts to effectively defend him as enumerated in the United States Constitution.

> "It is counsel's duty to investigate carefully all defenses of facts and law that may be available to the defendant, and if his failure to do so result in withdrawing a crucial defense from the case, the defendant has not had the assistance of counsel to which he is entitled. Mitchell V. United States, 104 U.S. App. D.C. 57, 259 F. 2d 787, 793.

Therefore, Petitioner contends that had counsel "effectively" represented him, Petitioner would very possibly have been acquited.

WHEREFORE, Petitioner prays that this Honorable Court, after examination of the records, grant him relief.

Willie James Gibson

WILLIE JAMES GIBSON
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